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In The
Supreme Court of the United States

MARTHA JANE CLINE, Executrix of the Estate of Jackie Edward Cline,

Petitioner,

v.

ASHLAND, INC., et al.,

Respondents.

On Petition For A Writ Of *Certiorari* From The Supreme Court Of Alabama

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

A. THE FEDERAL QUESTION IN THIS CASE WAS PROPERLY PRESENTED TO THE ALABAMA SUPREME COURT.

1. Respondents' central argument is that review should be denied because the federal question in this case – whether the lower court's holding violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution – was not properly presented to the Alabama Supreme Court. *See* Opposition at 5-15. As previously explained, however, the federal due process question *was* fully presented to the Alabama Supreme Court, both in the initial round of briefing and upon rehearing. *See* App. 70-106 (excerpts from briefs below). Notably, in these two rounds of briefing, respondents never argued that this issue was not properly presented to the Alabama Supreme Court. Rather, they responded fully on the merits, arguing that the Alabama Supreme Court's interpretation of its statute of limitations did not violate either federal or state due process. *See* App. 81-85, 100-06. Thus, if anyone has waived an argument, it is respondents by arguing the due process issue over the course of many briefs without once suggesting that petitioner had forfeited it. *See Waddell & Reed, Inc. v. United Investors Life Ins. Co.*, 875 So.2d 1143, 1167 (Ala. 2003) ("Issues not raised in a party's brief are waived.").[1]

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[1] *Accord Engel v. Isaac*, 456 U.S. 107, 125 n.26 (1981) (declining to consider petitioner's claim that government waived an argument because petitioner's waiver argument had itself been waived); *Geva v. Leo Burnett Co.*, 931 F.2d 1220, 1225 (7th Cir. 1991) (considering defendant's claim of waiver to be waived); *Wilson v. Attaway*, 757 F.2d 1227, 1247 (11th Cir. 1985) (plaintiff's assertion that qualified immunity had been waived came too late and was itself waived).

2. Respondents' fall-back position is that the Alabama Supreme Court lacked jurisdiction to decide the federal due process question because it was not properly raised in the trial court. *See* Opposition at 12-13. This argument is also in error. First, the federal due process issue *was* presented to the trial court, in the form of an *amicus* brief that was filed at the request of Mr. Cline's then-counsel and with the explicit permission of the trial court (*see* App. at 56-69) – facts that respondents do not contest.[2]

Moreover, even if the issue had not been presented to the trial court, that would not have deprived the Alabama Supreme Court of jurisdiction to consider the issue. For almost a century, Alabama appellate courts repeatedly have held that they possess the jurisdiction to consider issues not raised in the trial court, particularly in cases involving important issues of public policy.[3]

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[2] Respondents do complain that the *amicus* brief was never served upon the Attorney General of the State of Alabama, "as is required by Alabama law when a party challenges the constitutionality of a statute." Opposition at 3 (citation omitted). This argument is wrong because service upon the Attorney General is only required on a challenge to a statute, municipal ordinance, or franchise. *See* ALA. CODE § 6-6-227 (1975). Petitioner's decedent never asserted that any statute is unconstitutional, but rather that the court-created accrual rule denied Mr. Cline due process of law. Thus, he was not required by Alabama Code § 6-6-227 to join the Attorney General in the trial court. *See Williams v. Alabama Power Co.*, 730 So.2d 172, 174 n.2 (Ala. 1999).

[3] For example, in *Williams*, 730 So.2d at 173, the "only issue before the circuit court was the amount of 'just compensation' Williams [the appellant] should receive for the easement across his land." It was only on appeal to the Alabama Supreme Court that the plaintiff raised a constitutional issue, arguing that "the state and federal constitutions require that 'just compensation' be paid for property condemned in an eminent domain proceeding. . . . " *Id.* Even though the constitutional

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Nor is there any question that the court below actually considered the due process implications of its ruling. Although the majority was silent on this issue (and all others), two of the accompanying decisions mention due process. *See* App. 5-6 (See, J., concurring specially) (discussing state due process); App. 36-37 (Harwood, J., dissenting) (same). That neither of these decisions explicitly mentions *federal* due process is irrelevant, because it is well-established that this Court possesses jurisdiction to review a state court judgment where the state court's refusal to deal with a federal question is a mere evasion of the Court's jurisdiction. *See* Robert L. Stern et al., SUPREME COURT PRACTICE, § 3.18, at 178 (8th ed. 2002) (citing *Rogers v. Alabama*, 192 U.S. 226, 230-31 (1904)). *See also id.* at 176 ("[S]tate court's refusal or failure to articulate its denial of the federal claim is just as reviewable as an express decision on the point.").

3. Respondents' final procedural argument is that review should be denied because the Alabama Supreme Court's ruling may have rested on one of the substantive grounds raised by respondents in support of their summary judgment motion. *See* Opposition at 14-15. This

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issue was not raised below, the Alabama Supreme Court took the issue under consideration. *Id.*; *see also Knox v. Dillard*, 72 So.2d 56, 60 (Ala. 1916) ("[Where] the determination by this court of questions involving matters of public concern cannot be had without the consideration and decision of the constitutional validity of enactments, this court must, in the discharge of its grave duty in that regard, take account of such questions, whether raised or argued in the lower courts or not. . . .") (McClellan, J., dissenting); *All South Bonding Co., Inc. v. Alabama*, 496 So.2d 786, 787 (Ala. Civ. App. 1986) ("The constitutional issue was never presented to the trial court, and it is therefore not usually available for argument on appeal . . . *however, we have considered it and find it not convincing*.") (emphasis added).

argument is easily laid to rest. Although the majority did not write an opinion in this case, the three accompanying opinions make no mention of any of the substantive arguments raised by respondents at the trial court level. *See* App. 2-48. The dissenting opinion further makes clear that, given the trial court's focus on the statute of limitations issue, petitioner intentionally "forwent" developing a full evidentiary record on the causation issues raised by respondents, and that all parties to the case always understood that "the planned appeal would focus solely on [the] statute of limitations issue." App. 43. Indeed, by order dated March 21, 2006, the Alabama Supreme Court *limited oral argument to the statute of limitations issue presented in the case*. In light of these facts, respondents' contention that the majority's decision may have rested on an independent and adequate state ground falls flat.

B. RESPONDENTS' SUBSTANTIVE ARGUMENTS AGAINST REVIEW LACK MERIT.

1. All of respondents' substantive arguments against review hinge on a single proposition of law: that, contrary to petitioner's contentions, Mr. Cline *could* have filed a lawsuit within two years of his exposure to benzene. *See* Opposition at 16-17. Based on this statement of Alabama law, respondents argue that this case does not present an issue worthy of review.

Respondents' characterization of Alabama law, however, is demonstrably false. For more than a century and a half, the Alabama Supreme Court has consistently held that a cause of action does not accrue until there is an

actual injury.[4] The more recent decisions involving the accrual of toxic tort actions have not varied from this ancient rule.[5]

The dissent in this case recognized as much. Justice Harwood, joined by three other justices of the Alabama Supreme Court, emphasized that "Alabama law has *long required* a manifest, present injury before a plaintiff may recover in tort." App. 35 (citations omitted) (emphasis added). Justice Harwood further recognized, moreover, that under Alabama law, petitioner's decedent was effectively stripped of *any* opportunity to file a lawsuit: no matter when he filed the action, it would have been "either too soon or too late." App. 37. In light of these observations, respondents' argument that Mr. Cline could have filed his lawsuit back in 1987, twelve years before he ever became sick from his benzene exposure, fails.

Finally, respondents' argument ignores the nature of Mr. Cline's claims, which arose out of the Alabama Extended

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[4] *See, e.g., Roundtree v. Brantley*, 34 Ala. 544 (1859) (action for flood damage did not accrue when ditch was dug but instead upon subsequent flood damage); *West Pratt Coal Co. v. Dorman*, 49 So. 849, 850 (Ala. 1909) (action for collapse of surface did not accrue during subterranean mining activity but instead upon subsequent collapse of surface); *Payne v. Alabama Cemetery Ass'n, Inc.*, 413 So.2d 1067, 1072 (Ala. 1982) (action did not accrue on negligent destruction of body but instead on subsequent discovery by family).

[5] *See, e.g., Thomas v. BSE Indus. Contractors, Inc.*, 624 So.2d 1041, 1045 (Ala. 1993) (dismissing outrage action brought by individual exposed to asbestos but not yet ill); *Hinton v. Monsanto Co.*, 813 So.2d 827, 831-32 (Ala. 2001) (dismissing action for "medical monitoring" by individuals exposed to polychlorinated biphenyls but not yet ill); *Houston County Health Auth. v. Williams*, ___ So.2d ___, 2007 WL 80797, at *12 (Ala. Jan. 12, 2007) (vacating class certification order because "mere exposure to a hazardous substance resulting in no present manifestation of physical injury is not actionable").

Manufacturer's Liability Doctrine ("AEMLD"). One of the elements of an AEMLD claim, a common law cause of action first announced in 1976, eleven years before Mr. Cline's last exposure to the respondents' benzene, is that the plaintiff must have suffered an actual injury. *Casrell v. Altec Indus., Inc.*, 335 So.2d 128, 132 (Ala. 1976); *Atkins v. American Motors Corp.*, 335 So.2d 134, 141 (Ala. 1976). Thus, mere exposure is insufficient to support an AEMLD claim, and Mr. Cline could not have filed an action against the respondents until 1999, when he first had a "manifest, present injury," acute myelogenous leukemia.

2. Once it is understood that Alabama law deprives tort victims whose injuries do not manifest within two years of exposure of *any* opportunity to file a lawsuit, the remainder of respondents' arguments unravel. Thus, for example, respondents argue that the decision below does not conflict with this Court's prior holdings that a limitations period violates federal due process unless it provides a "reasonable" period of time to file suit, *see, e.g., Terry v. Anderson*, 95 U.S. 628, 633 (1887), because, respondents claim, Mr. Cline could have filed suit in 1987, following his last exposure to benzene. Opposition at 18. As explained above, however, toxic tort victims in Alabama whose injuries do not manifest within two years of their exposure are deprived of *any* opportunity to file suit. This cannot be viewed as "reasonable" under any circumstances, thereby placing the decision below in direct conflict with numerous decisions of this Court.[6]

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[6] Respondents are also incorrect in arguing that this Court has "passed on the opportunity to decide" the issue presented in this case "on at least seven occasions." Opposition at 18. Four of the seven occasions were denials of petitions for writs of certiorari, and it is well

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Respondents fare no better in attempting to deny the conflict between the decision below and the numerous state high-court decisions striking down unreasonably short statutes of limitations on due process grounds. *See* Petition at 16-21. Here again, respondents' main argument is that these cases are distinguishable because "Alabama law . . . provided decedent with a two-year period following his last exposure in which to pursue an exposure related cause of action . . . " Opposition at 21. Because respondents' premise is false, the argument necessarily fails.

Equally unpersuasive is respondents' argument that all the federal cases cited by petitioner that conflict with the decision below, *see* Petition at 22-26, are distinguishable on the ground that "each involve[s] the situation in which a state legislature [as opposed to a court] enacted the law that eliminated or substantially reduced the period within which a party could pursue an existing

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established that "[t]he denial of a writ of certiorari imports no expression upon the merits of the case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490 (1923). The three remaining cases, which were dismissed by this Court for want of a federal question, are not only of questionable precedential value, *see, e.g.*, *Boggs v. Boggs*, 520 U.S. 833, 849 (1997) (dismissals for want of a substantial federal question are "not entitled to full precedential weight") (citation omitted), but they are all readily distinguishable on their facts. Thus, two of the dismissals involved limitations periods that were determined to have afforded litigants a "reasonable" amount of time to file suit, as opposed to the present case, which involves court-made rules that deprive most toxic tort victims of *any* opportunity to file suit. *See Bunker v. Nat'l Gypsum Co.*, 441 N.E.2d 8, 12 (Ind. 1982); *Anderson v. Wagner*, 402 N.E.2d 560, 567-68 (Ill. 1980). The final case cited by respondents, *Ellerbe v. Otis Elevator Co.*, 618 S.W.2d 870 (Tex. Civ. App. 1981), did not examine the reasonableness of any statutory limitations period, but instead involved the issue of whether or not a statute of repose applied to the named defendant in that case – an entirely different question than that presented here. *See infra* at n.7.

cause of action." Opposition at 23. This is a distinction without a difference: whether the unreasonable reduction or elimination of a limitations period is achieved by legislative action or by judicial fiat, the result is the same: a clear violation of due process.

Respondents' argument that the weight of authority is actually *consistent* with Alabama's regime, *see id.* at 24-26, also lacks merit. Most of the statute-of-limitations cases cited by respondents involve limitations periods in which injured parties had at least *some* opportunity in which to file suit. *See id.* This case, in contrast, involves a situation in which many toxic tort victims have literally *no* opportunity to file suit. In any event, to the extent respondents are correct that there are a host of federal Court of Appeals decisions upholding limitations periods comparable to Alabama's, then there is even more of a conflict below that cries out for resolution by this Court.[7]

3. Finally, respondents argue that "[t]here is no manifest injustice resulting from the decision of the Supreme Court of Alabama" because statutes of limitations are actually designed to protect *defendants*, and that it would be unfair to permit litigants like Mr. Cline to file suit long after his injuries occurred. *Id.* at 28. Here again, respondents duck the real issue in this case, which is not whether Alabama has the right to create some temporal

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[7] Respondent's reliance on certain cases upholding statutes of repose against constitutional challenges, *id.* at 25, is misplaced because, in such cases, the effect of the statute is to ensure that the cause of action never arises in the first place. A statute of limitations operates very differently, however, by cutting off an existing cause of action that has already arisen and thus has become a "species of property" protected by the Due Process Clause of the United States Constitution. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982).

limitation on the right to sue. Surely, it does. But the question here is whether the Alabama judiciary may, consistent with federal due process, effectively *eliminate* an existing cause of action by announcing bizarre accrual rules that render any attempt to sue either "too soon or too late." App. 37 (Harwood, J., dissenting). The answer to this question is plainly no. Review is warranted to prevent the Alabama Supreme Court from continuing to flout the due process rights of Alabama citizens and square the law in Alabama with the well-settled precedent of this Court.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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